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Asking the Right Question

Frank Munger

Marianne Constable's essay, "Genealogy and Jurisprudence,"¹ brings the intellectual history of the law and society field within the framework of Nietzsche's six-stage history of metaphysics. Reorganized within that framework, the work of particular law and society scholars is seen to represent stages of thought about the relationship between the world of appearances described in empirical research and the possibilities for human action. Successive movements among law and society scholars pass, like Nietzsche's history of metaphysics, through stages of "error" (positivism, empiricism, critical legal studies, interpretive studies, constitutive theory), moving closer to complete acceptance of the view that action need not follow either legal rules or empirically described patterns and, thus, can be free.

Constable's essay advances what is now a long line of commentary questioning the role of empirical research in the law and society field. Her essay, more clearly than many recent contributions to this literature, surely asks whether empirical research now has any place in studies of law and society.² She argues: "The first five stages of Nietzsche's history can be taken to sketch the way in which jurisprudence, like metaphysics, has, through reason, long sought its foundations in the truths residing in a 'real world' . . . outside of, beyond . . . , and even in opposition to, 'life' in *this* world" (p. 555). She describes what she perceives as the progressive dethroning of reason in law and society studies. First, reasoned ideals were

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1. Marianne Constable, "Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law," 19 *Law and Soc. Inquiry* 551 (1994).

2. This essay asks what law and society scholarship should be about. Many would agree with one of Constable's principal criticisms, namely, that law and society scholarship should not be about knowing an already enacted world. Criticisms have been directed at a variety of concerns, including normal social science methods, avoiding a dialogue with established institutional values, and freeing perceptions of law and society from those "privileged" by normal science. These are different problems and could be addressed by different responses.

rejected by the legal realists. As social science became progressively more established, all reasoned aspirations were made contingent on the limits of "reality" and then displaced altogether by what is "possible"—all actions are limited, transformed, and dictated by what "is" as revealed through empirical research.³ Yet, the social structure identified by social science is just another constraining artifice derived from reason. Hence, critical legal studies, feminist jurisprudence, and constitutive theorists have rejected to a large degree the view that action is determined by social structure. These scholars' efforts represent the jurisprudence of the final liberating stage to the degree that they acknowledge that action springs from context, intuition, sensation, emotion, and personal moral judgment. They fail to achieve that stage when they suggest that human agency can (or should) be contained by rules.⁴ Although it is not at all clear what it means to act, let alone to intend or to reflect on one's intentions, in a social world in which an "ultimately inaccessible self-transformative force" (p. 588) is the guiding principle, it seems such a world would benefit little from empirical research.

There are two ways to react to what seems to me a rather abrupt ending at the threshold of the most meaningful question posed by the essay, namely, What should law and society studies be about? First, one might defend some law and society studies (and I mean by this law and society studies with an *empirical* base) as having produced knowledge which is useful and important, and as avoiding some of Constable's concerns (I read criticisms generally to be her criticisms, and not just Nietzsche's arguments).⁵

A second response might be that Constable does not take up the very problem that seems most important: describing what current scholarship fails to address and, thus, directing us more concretely toward alternative quests.

My concern is different, however. Constable's insistence that there have been distinct (though not necessarily chronological) stages of thought about agency, and that each individual scholar occupies a particular stage, leaves us with the wrong impression and leads us to the wrong questions. She is both right and wrong when she says that law, and our task, should now be seen to be beyond reason. She is right that human action is not entirely a matter of reason (if by reason we mean a fixed formula for producing "right" conclusions, correct predictions, or valid moral precepts). Human action may be most valuable when it is, in the words of Robin West

3. Donald Black's work is taken to epitomize such a view.

4. Constable points to such errors in the work of Unger, who argues at points that rules are needed to establish community, and in the work of Sarat and Kearns, who express a fear of unreasoning agency.

5. Her dissatisfactions with the most recent turn to interpretive methods and constructive theory on one hand and with "normal" social science on the other, are the same, namely, that they ultimately view social behavior as contained and determined.

quoted by Constable, "grounded not in reason but in love, nurtured not in the head but in the heart" (p. 584). But we experience the social world as one in which our behavior and the behavior of others has continuity. When we extend our experience with the aid of "data collection" (whether we are opening trade routes to the Orient or examining the social construction of disability with the aid of an NSF grant), we find more continuity—differences and samenesses between ourselves and others that seem to persist. We are thus challenged to consider our own actions in such a world. We are not autonomous to change the world just as we please. We are, on the other hand, "free" in a very fundamental sense, to act on our perceptions (or in spite of them).

Therefore, where Constable's account seems to be in error is in its failure to recognize that one can hold these opposing understandings of the social world simultaneously. As she acknowledges in her introduction, the linearity of Nietzsche's history is artificial. But it is also possible to view scholars "from" Donald Black "to" Roberto Unger as possessing a more complex understanding than the conventional characterization of the former as a positivist and the latter as a critical/constitutive theorist. As Constable notes, in constituting the ideal community Unger employs some familiar instrumentalisms. Conversely, one should not read Black's *The Behavior of Law* without careful attention to the concluding chapter, in which Black recognizes the possibility of future communities that will be "communal and situational at the same time" and where "law . . . might even disappear."⁶ Black's concern is, of course, as is Constable's, that we have constituted a world in which many futures are possible.

The problem for Unger and Black, and for us all, lies instead in the fact that the production of knowledge about continuities in human behavior has its risks because such knowledge has the power to reproduce hierarchy, difference, and other limitations. I believe that this dilemma is inescapable, however, because if social science knowledge can reproduce hierarchy, so can Nietzschean acts of unreason.⁷

The divided commitment to understanding continuity by recognizing and describing meaningful similarity in human experiences on the one hand and to subjectivity guided by moral judgment (Singer) or love (West) on the other seems to me to be especially strong among scholars whose careers began in the 1960s.⁸ In the context of the civil rights movement and of the anti-institutionalism of the antiwar movement, strong moral judgments—and a strong sense of the desirability of an ethical and affective base for

6. Donald J. Black, *The Behavior of Law* 137 (New York: Academic Press, 1976).

7. Thus, Nietzsche is often linked with fascism, because to destroy "reason" in all its institutionalized forms is not to destroy existing hierarchy or power.

8. Since the contemporary law and society movement began with the careers of these scholars, the tenor of law and society scholarship has been greatly influenced by the perceptions I am about to describe.

community—were motives for empirical research. The production of knowledge about the fact of oppression and its apparent sources in existing institutions seemed to be, and was often treated as, a countercultural act. Just as the movements failed to produce the desired changes, so the scholarship of that generation became a description of the barriers to change on the one hand and of increasingly complex and contingent theories of empowerment on the other.

It is not a surprise that this legacy of an earlier era of moral engagement in scholarship should now be a source of deep ambivalence for some of those who produced it and a target of criticism intended not to refute it but to delegitimize it and to end its hold over thought. The very intellectual edifice advanced to direct the forces of change in the 1960s has come to be viewed as a barrier to full appreciation of the possibilities for human action. It is not surprising, then, that the terms “privileged” and “hegemonic” have been appropriated from the political theory of that era to describe the very social science methodologies that supported the theory.

On many fronts there are contemporary expressions of concern with similar issues—discarding theory about structure in favor of theory about social construction, turning from descriptive data to narrative, interest in linking morality and legal validity, the rise of perspective-driven theory (e.g., critical race and feminist theory). Yet, as all these beginnings at the margin must recognize, the problems of transformation are problems of collective, not individual, action. Acts of will are fine, but how do they occur? They are not simply emanations of an independent moral judgment or of love but are always, in many important ways, socially constructed if not socially determined. To miss the relationship between will and the social construction of power is to miss the potential for racism and fascism as well as the potential for freedom and for fuller realization of self. To ignore the fact that social action is often patterned, and even predictable, and that it may be understood by others *only* because it is linked to similar experience, is a mistake.

The fact that power (whether or not guided by reason) is socially constructed does not invalidate what seems to me to be Constable’s ultimate and important concern—that action be viewed as capable of transforming social relationships and society. The problem lies in understanding agency as referring simultaneously to the way an individual’s behavior is implicated in particular patterns of behavior involving others, and to how the individual thinks about these actions. Law and society studies must attempt to imagine action as it is for the individual and also to describe it as a part of larger patterns the individual may not see. This done, the real problem arises: interpreting descriptions on both levels in ways that will advance individual well-being by two, sometimes conflicting paths, by enabling and empowering the individual, and also by encouraging more humane and nurturing communities and societies.